Supreme Court, U.S.
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No. 95-1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LIFE CARE CENTERS OF AMERICA, INC. AND AMERICAN LIFESTYLES, INC.,

Petitioners,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

REPLY OF THE PETITIONERS

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REPLY OF THE PETITIONERS

1. In their Brief in Opposition ("Opp."), Respondents do not refute Life Care's showings that there are conflicts among the lower courts, and with this Court's decisions, regarding (a) whether close appellate review is constitutionally required (Pet. 15-22) (b) whether the closeness of the case must be considered by appellate courts reviewing punitive damage awards (Pet. 11-13), and (c) whether a defendant's net worth must be considered by appellate courts in reviewing the appropriateness of the punitive award. (Pet. 13-15)

2. Respondents' submission is instead largely devoted to arguing an irrelevant proposition — that there was sufficient evidence to support *a* punitive damage award against Petitioners under Colorado law. *See* Opp. 1-2, 12-13, 17-18, 20-22. The issues here concern only violations of the substantive and procedural components of the Due Process Clause, not sufficiency of the evidence under Colorado law.

3. Respondents do not refute Life Care's showing (Pet. 21) that the court of appeals' decision exacerbates a clear and pervasive conflict among the lower courts, and with this Court's decision in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), regarding the Due Process Clause's requirement of appellate review. Respondents urge, in a footnote, that *Honda* is "not relevant to this case." (Opp. 13 n.6) But that is simply not so: In *Honda* this Court held that "Oregon's denial of judicial review of the size of punitive damage awards violates the Due Process Clause." *Honda*, 114 S. Ct. at 2341. Respondents speculate that the court of appeals gave the punitive award careful appellate review (*e.g.*, Opp. 22); however, there is no indication from the court of appeals' opinion that this was so. Life Care's contention is that the opinion must itself show that the close review was given (Pet. 21); absent an opinion, there can be no assurance that effective review — and therefore Due Process — is provided.

4. The importance of, and conflict on, this issue is further confirmed by the brief *amici curiae* of The American Tort Reform Association *et al.* Those *amici* have persuasively shown that, despite this Court's decision in *Honda*, lower courts are

continuing to deny meaningful appellate review to punitive damage awards, affirming large punitive exactions with little or no analysis whatsoever. *Amici* have also shown, convincingly, that denying such meaningful review violates Due Process under the traditional three-factor analysis of *Mathews v. Eldridge*, 424 U.S. 319 (1976), and that review of this issue is important.

5. Life Care also showed (Pet. 15-18) that the "passion-and-prejudice" review applied in Colorado amounts to no review at all, and that there is a conflict among lower courts regarding the constitutionality of a "passion-and-prejudice" review of the size of punitive awards.

a. Respondents' first argument (Opp. 20-21) is that Colorado does not in fact apply passion-and-prejudice review. That is demonstrably wrong. Under Colorado law, as Respondents note (at 21) courts review the *fact* of punitive damage awards for sufficient evidence. But the only "reasonableness" review which Colorado courts give to the *size* of the award is limited to inquiring "if the jury was impermissibly motivated by prejudice or properly guided by the purposes for exemplary damages." *Frick v. Abell*, 602 P.2d 852, 854 (Colo. 1979). *See also Orijas v. Stevenson*, 31 F.3d 995, 1013 (10th Cir.), *cert. denied*, 115 S. Ct. 511 (1994); Pet. 15-18.

b. Respondents then urge that there is not a conflict in the lower courts because "Life Care's reliance upon the pre-*TXO* decision in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), is misplaced." (Opp. 21) Respondents have only confirmed the existence of a deep and insoluble conflict. Respondents correctly point out that the Third and Tenth Circuits have explicitly refused to adopt the *Mattison* analysis,[1] but they fail to point out (Opp. 22 n.13) that the "several judges of the Fourth Circuit [who] have criticized *Mattison*" (four out of 13)

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[1] *See Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.3d 373, 379 n.8 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2120 (1994); *Dunn v. Hovic*, 1 F.3d 1371, 1381 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993).

did so in dissent, in an *in banc* decision which reaffirmed *Mattison*. *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1414-18 (4th Cir. 1992) (*in banc*). And Respondents totally fail to address the conflicting State-court decisions cited by Life Care,[2] which hold that such supine appellate review violates Due Process. *See* Pet. 17.

6. Life Care showed that the decision below, which refused to consider the closeness of the case as shown by the law of other jurisdictions, conflicts with this Court's decision in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915), and with the precedents of other courts. Pet. 11-13; *see also Ampat/Midwest, Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035, 1044 (7th Cir. 1990) (Posner, J.) ("This was a close case on liability for fraud, and it makes sense to scale down an award of [punitive] damages in recognition of a distinct possibility that the judgment may be premised on a mistaken finding of liability"). Respondents urge three points in opposition.

a. Respondents contend that "this Court has never required an analysis of 'the closeness of the case'" (Opp. 13), yet they totally fail to mention, let alone distinguish, *Danaher*, which held that a penalty premised on conduct having "the support of repeated adjudications in other jurisdictions" was so arbitrary as to violate Due Process. *Danaher*, 238 U.S. at 491. Nor do Respondents cite or attempt to distinguish the other cases cited by Life Care. This conceded conflict merits certiorari.

b. Respondents suggest that the case was not, in fact, close because "no jurisdiction has or would condone Life Care's conduct" of "schem[ing] to divert patients," "unlawful competition," etc. (Opp. 18-19)[3] Yet Respondents are unable to

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[2] *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs.*, 596 A.2d 687, 709-11 (Md. Ct. Spec. App. 1991).

[3] Despite Respondents' inaccurate and pejorative recounting of the facts (Opp. 2-12), which suggests that Life Care was found liable for deliberately ruining Respondents' business, the case was not presented

contest Life Care's showing (Pet. 6 & n.4) that until the decision in this case, the law of all jurisdictions was uniformly contrary to the theory of liability adopted by the Colorado courts in this case. Life Care's "scheme" was only "unlawful" because Colorado's courts, alone among all American jurisdictions, held that a nonexclusive agent was barred from competing with his principal. Respondents' pejorative adjectives aside, had the case arisen in any of these other jurisdictions, Life Care's competition would plainly have been "lawful" — and not deserving of *any* liability at all, let alone *punitive* liability.

c. Lastly, Respondents attempt to tax Life Care with failing to raise the closeness of the case as an evidentiary matter at trial. (Opp. 17) But only the courts, not a jury, can evaluate whether a case is "close" on the law. The issue here is whether this inquiry should be part of the courts' post-trial review.

7. Life Care also showed (Pet. 13-15) that appellate courts must consider a defendant's net worth in order to assure that the punitive award comports with the Due Process requirement that the award be no "greater than reasonably necessary to punish and deter." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991). Respondents do not dispute that the punitive award constituted over 20% of Life Care's then-net worth, and they do not offer a rational reason for a 20% penalty in this case. Nor do they dispute the existence of a conflict among lower courts on this issue. (*See* Pet. 14) The arguments they do offer are unconvincing. -

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to the jury on such a theory. Indeed, the jury in this case had only to find that Life Care willfully competed without consent from the nursing home in order to find punitive liability. In addition to Jury Instruction 65 (set forth in the Appendix to the Brief in Opposition), *see* Jury Instruction No. 26, which provided in pertinent part: "It is a breach of fiduciary duty to compete with principal with respect to the subject matter of the agency unless the principal understands that the agent is to compete or a course of dealing between the agent and the principal indicate that this is understood."

a. Respondents say (Opp. 19 n.10) that the court of appeals *did* consider Life Care's net worth. But the court of appeals' opinion confirms that that court did not evaluate the award against Life Care's net worth; instead, that court simply mentioned Life Care's net-worth argument and followed that statement immediately with the *non sequitur* that the statutory maximum one-to-one ratio of compensatory to punitive damages perforce obviated any Due Process challenges to punitive damage awards. Pet. App. 15a; *see also* Pet. 13.

b. Next, Respondents cite decisions from the First and Eighth Circuits for the unremarkable proposition that there is "no general rule defining the maximum proportion of net worth that may be exacted." Opp. 19 (quoting *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 706 (1st Cir. 1995)). But that is exactly why appellate courts must consider a defendant's net worth — there is "no general rule" because punitive damage awards must be evaluated in each case. *See* Pet. 14-15. As Respondents' own case confirms, "the consideration of . . . net worth is integral to the objectives of punitive damages: it ensures that the award is neither too severe nor too trivial." *CEH, Inc.*, 70 F.3d at 706.

c. Lastly, Respondents again argue "waiver" because Life Care did not offer evidence of its net worth to the jury. (Opp. 20) This argument misses the point entirely. First, some "scholars have suggested that consideration of wealth [in punitive damage cases] may be unconstitutional." *Herman v. Sunshine Chem. Specialties, Inc.*, 627 A.2d 1081, 1087 (N.J. 1993) (citing Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Leg. Stud. 415, 416, 424-25 (1989)). Second, regardless of whether a company's net worth is considered by the jury as evidence,[4] it is critical that appellate

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[4] *See generally* Annotation, *Punitive Damages: Relationship to Defendant's Wealth As Factor In Determining Propriety of Award*, 87 A.L.R.4th 141, at §§ 3-6 (1991) (indicating that jurisdictions are split over the propriety of allowing evidence of a defendant's net worth in punitive damage actions).

courts consider that factor to ensure that the award is no greater than reasonably necessary to punish and deter. For instance, Alabama's *Green Oil* decision, which this Court approved as a proper approach to judicial review of punitive damages in *Haslip*, 499 U.S. at 22, held that although "the jury is not allowed to consider the financial position of the defendant" under Alabama law, "[t]he defendant's financial position is, however, a consideration essential to a post-judgment critique of a punitive damages award." *Green Oil v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989).[5]

8. Lastly, Respondents urge (Opp. 22) that the pending case of *BMW of North America, Inc. v. Gore*, 115 S. Ct. 932 (1995) (granting certiorari) "has no bearing on this case" because in *BMW* the Alabama Supreme Court did not "offer[ ] any explanation for the remittitur" of the punitive damage award. This purported distinction is premised on Respondents' erroneous view that the court of appeals gave the size of this punitive award searching appellate review. Moreover, Respondents do not dispute Life Care's showings that this case presents the same closeness-of-the-case (Pet. 13) and appellate review (Pet. 22) issues as does *BMW*. At a minimum, this case should be held for the decision in *BMW*.

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[5] Respondents also suggest in a footnote (Opp. at 20 n.11) that Life Care's post-trial briefs did not argue this point. Again, not so. In its post-trial briefs, Life Care pointed out that the $6 million compensatory award was more than adequate to punish and deter future violations, and that the addition of the punitive damage award violated Due Process because it constituted a disproportionate share of Life Care's $29 million net worth. Brief in Support of Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial at 91-92; Reply Brief in Support of Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial at 39-40.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition and in the *amicus* brief of The American Tort Reform Association *et al.*, certiorari should be granted.

Respectfully submitted,

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